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No. 277

IN THE

Supreme Court of the United States

October Term, 1950

ISLAND CREEK FUEL AND TRANSPORTATION COMPANY, A Corporation,

Petitioner.

v.

H. CLYDE REEVES, COMMISSIONER OF REVENUE FOR THE STATE OF KENTUCKY, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner (appellee in the court below) prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky, entered in the above entitled case on March 17, 1950, and as modified on June 2, 1950, on denial of petitioner's petition for rehearing.

OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at ..... Ky. ....., 230 S. W. 2d 924, and is printed in Appendix A, infra, pp. 19-35 (R. 167-177).

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on March 17, 1950 (R.167). Petitioner's petition for rehearing, filed April 19, 1950 (R. 156), was denied on June 2, 1950 (R. 178). The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1257 (3).

The Federal questions here sought to be reviewed were raised in the court of first instance (Circuit Court of Franklin County) in a petition in equity for an injunction (R. 1-5) and the defendants' (respondents here) answer thereto (R. 17-20). The Franklin Circuit Court passed upon such questions by granting without opinion the injunction as prayed for (R. 155). The federal questions were raised in the Kentucky Court of Appeals on the transcript of the record from the Franklin Circuit Court, the briefs filed on behalf of all parties and amici curiae, and petitioner's petition for rehearing (R. 156-167). The Court of Appeals in reversing the Franklin Circuit Court (R. 167-177), and in denying the petition for rehearing (R. 178), held that the petitioner's rights

under the federal statutes and the Constitution of the United States had not been infringed.

QUESTIONS PRESENTED

1. Whether, consistently with the due process clause of the 14th Amendment to the Constitution of the United States, watercraft which from time to time pass through Kentucky while engaged in commerce between two other states can be subjected to apportioned ad valorem taxation by Kentucky of 94% of such crafts' whole value even though: (a) the owner is a non-resident of that state and has no office, terminal facilities or other property therein; (b) there is no continuous daily presence in that state throughout the taxing year of some of the units sought to be taxed; (c) throughout such year there are considerable periods of time of many days' or several weeks' duration when none of the watercraft is in Kentucky; (d) no special privilege, powers, or facilities are afforded such craft by Kentucky; and (e) Kentucky's jurisdiction over the river is concurrent with the states along the opposite shore.

2. Whether an ad valorem tax apportioned on a mileage basis under the circumstances as set out under Par. 1 above is arbitrary and void under the due process clause where such basis has no relation to the period of time the vessels were present in the state, to the benefits afforded by the state, or to the business done within the state.

3. Whether Article 4 of the Ordinance of July 13, 1787 (Chap. 8, 1 Stat. at L. 50, 51, 52, note; see also Appx. B, infra, p. 36) prohibits the apportioned ad valorem taxation by Kentucky of watercraft owned by a non-resident and whose presence (if any) in Kentucky arises solely in the course of and because of such crafts' navigation of the Ohio River between ports in other states.

4. Whether Sec. 11 of the Compact of Virginia with Kentucky (Hening's Virginia Statutes, Vol. 13, p. 17) approved by Act of Congress February 4, 1791, (1 Stat. at L. 189; see also Appx. C, infra, p. 37) prohibits the taxation of watercraft under the circumstances as set out under Par. 3 above.

STATUTES INVOLVED

The pertinent federal and state statutory provisions are printed in the appendices hereto and are as follows:

Article 4 of the Ordinance of 1787, 1 Stat. at L. 50, Ch. 8., Appx. B, p. 36.

Sec. 11 of the Virginia-Kentucky Compact, Hening's Virginia Statutes, Vol. 13, p. 17, Appx. C, p. 37.

Kentucky Revised Statutes, Secs. 68.090, 132.-190 (1) - (3), 132.200 (part) and 132.-330, Appx. D, pp. 38-41.

STATEMENT

(a) Nature of the Action

This action was begun in the Circuit Court of Franklin County, Kentucky, for an injunction to prohibit the imposition of an apportioned state and county ad valorem tax on petitioner's towboats and barges engaged in interstate transportation on the Ohio River. After hearing the matter on the petition for an injunction, the defendants' answer thereto and proof introduced by both parties, the Circuit Court awarded a permanent injunction. On appeal taken by the defendants (respondents here) the Circuit Court was reversed by the Kentucky Court of Appeals, the court of last resort in that state.

(b) The Proceedings

In November, 1943, omitted tax assessment proceedings were instituted under Kentucky Revised Statutes, Sec. 132.330, (Appx. D, p. 40-41 infra) in the eight counties of Kentucky which border on the Ohio River from the mouth of the Big Sandy (a tributary of the Ohio which marks the eastern boundary of the state) to and including Kenton County, Kentucky, opposite the City of Cincinnati. A "statement" (an example of which may be found at R. 6-16) was filed in each county on the relation of the State Commissioner of Revenue by which it was sought to assess an ad valorem

tax for the years July 1, 1938 to June 30, 1943, inclusive, against 94.6% of the whole value of petitioner's two towboats and forty-six * barges apportioned among the counties according to the ratio that the river frontage of each county bears to the total river frontage of all eight counties.** The remaining 5.4% of the whole value was allocated to West Virginia on account of the river mileage from the mouth of the Big Sandy to Huntington, West Virginia. Process based on this statement was issued but service was stayed by a temporary injunction issued January 11, 1944, and made permanent November 20, 1948 (R. 155).

The grounds upon which petitioner sought an injunction were that petitioner was subjected to a multiplicity of suits; that neither the tax assessment proceedings nor the apportionment method of taxation was authorized by the statutes of Kentucky; that the vessels sought to be taxed had no situs in Kentucky; and that such a tax, if imposed, would violate the rights secured to the petitioner under Article IV of the Ordinance of 1787 (1 Stat. at L. 50), Sec. 11 of the Compact of Virginia with Kentucky (Hening's Virginia Statutes at Large, Vol. 13, page 17) approved by Act of Congress February 4, 1791 (1 Stat. at L. 189), the 14th Amendment to the Constitution of the United States, and Article 1, Sec. 8 (The "Commerce Clause") of that Constitution. The Circuit Court

*The proof showed that the petitioner actually owned fifty-four barges.
**Special treatment was provided for certain "terminal areas" in two of the counties.

granted the injunction prayed for but did not state its grounds for so doing (R. 155). In reversing the Circuit Court the Court of Appeals held that the proceedings and the proposed assessments were authorized under KRS 68.090, 132.190 and 132.-200, and that such a tax would not violate the Ordinance of 1787, the Virginia-Kentucky Compact or the Constitution of the United States. The question of the propriety of the proceedings as regards the Kentucky statutes is not raised here.

(c) The Facts

The material facts are undisputed.

The petitioner is a Maine corporation and is a wholly owned subsidiary of Island Creek Coal Company, a producer of bituminous coal mined in Logan County, West Virginia (R. 54). During the tax years in question (1938-1942), petitioner was engaged in the transportation of coal in barges on the Ohio River from a loading tipple at Huntington, West Virginia, to various destinations in other states (R. 26-28). The most frequent point of delivery was Cincinnati, Ohio, (R. 27), but deliveries were also made to other points in Ohio (Ironton, Ripley, Manchester, New Boston), Indiana (Lawrenceburg), West Virginia (Pt. Pleasant, Harewood, Alloy) and, most rarely, in Kentucky at Ashland (R. 107-154). In the pursuit of this business petitioner owned and operated two towboats (the "Sam P. Suit" and the "Catherine Davis"), fifty-

four coal barges, dumping facilities at Huntington, West Virginia, and elevating facilities at Cincinnati, Ohio (R. 24, 26, 32). Petitioner was not licensed to do business in Kentucky (R. 3) and owned no property or facilities in that state (R. 35), although, when required by the exigencies of navigation, petitioner used mooring facilities near Coal Haven, Kentucky, which were owned by an individual as the nominee for the parent company (R. 31, 59). The Court of Appeals found that during the five-year period (July 1, 1938 to June 30, 1943) the two towboats combined made 116 calls and delivered 154 barges at Kentucky ports while en route between ports in other states, which compared with 1592 calls made and 8417 barges delivered at all ports during that period (R. 120-148). Aside from the occasional mooring to the Kentucky shore because of hazardous navigation conditions, these calls and deliveries (roughly 7% of the total calls and less than 2/10ths of 1% of the total barges delivered) were the only contact made by the boats and barges to Kentucky terra firma (R. 30-31).

Since the territorial boundary of Kentucky has been fixed at the northwestern low water mark of the Ohio River *(Indiana v. Kentucky*, 136 U. S. 479), in any voyage downstream beyond the mouth of the Big Sandy petitioner's vessels necessarily floated for some part of the distance within the territorial limits of Kentucky (R. 30), although under the Virginia-Kentucky Compact (Appx. C,

infra) Kentucky's jurisdiction over the river is concurrent with the State of Ohio. *

Each voyage made and the actual movement of the towboats and barges during the tax years involved are shown on a summary or tabulation compiled from the logs of the towboats (R. 120-148) and which was stipulated by both parties to be correct (R. 20). This tabulation shows that there were frequent occasions in every year, some of them of many days' duration, in which there were no vessels whatever within Kentucky. During the five-year period there was an average number of 203 days each year in which both towboats, and their accompanying barges, were simultaneously outside of the state. For random example, there were no towboats (and consequently no barges) in Kentucky during the following periods:

> From July 21 to July 25, 1938, inclusive, the Suit was docked at Cincinnati, and the Davis at Marietta, both ports in Ohio (R. 120, 121);
>
> From April 13 to May 17, 1939, inclusive, (R. 123) from January 19 to February 11, 1940, inclusive, (R. 127) and from April 13 to May 6, 1941, inclusive, (R. 136) both boats were tied up at Huntington; and

*The method of apportionment proposed is based on the assumption that the situs of the vessels could be confined to the stretch of the River (162 miles) between Huntington, West Virginia, and Cincinnati, Ohio, so that the whole value of the vessels could be apportioned on the basis of that mileage (R. 6-14). The proof showed, however, that the vessels made frequent voyages to other destinations, both downstream from Cincinnati and upstream from Huntington. No note was made of that point by the Court of Appeals.

From November 13 to November 18, 1942, inclusive, the Davis remained at Huntington while the Suit was docked four days at Huntington and two at Cincinnati (R. 152).

On this state of stipulated facts the Kentucky Court of Appeals held that the vessels were "present in Kentucky and were being used and employed there with a consistent continuity and not spasmodically and temporarily," and therefore had acquired a tax situs that would justify the taxation of 94.6% of their whole value. The Court of Appeals dealt very briefly with the Ordinance of 1787, the Virginia-Kentucky Compact and the Commerce Clause, saying that here there was nothing more than an attempt to tax property having a situs within the state and not a levy on navigation or commerce as such.

REASONS FOR GRANTING THE WRIT

1. The Court below in effect has overruled a long line of decisions of this Court concerning the apportionment method of ad valorem state taxation of instrumentalities of interstate commerce, and has announced a revolutionary doctrine which conflicts in principle with the fundamental rules laid down by this Court to govern that subject.

The guiding principle of *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 20; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 200; *New York ex rel. New York C. & H. R. R. Co.*

v. Miller, 202 U. S. 584, 596; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158; and *Northwest Airlines v. Minnesota*, 322 U. S. 292, 297, is that the doctrine of tax apportionment can be applied to instrumentalities engaged in interstate commerce only in those cases in which an average number of units is found to be present in the state every day. This principle was stated by Mr. Justice Frankfurter in the *Northwest Airlines* case (322 U. S. 297) thus:

> "But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year. **** The continuous protection by a State other than the domiciliary State - that is, protection throughout the tax year - has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered."

In the case at bar the Kentucky Court of Appeals has disregarded this requirement both in its treatment of the facts involved and in its statement of the law of the matter. The facts are that petitioner's vessels "visited" Kentucky for only fractional periods of each year, that there were many days and long periods in each year during which no vessel whatever was within the state, and that no continuous protection was afforded them

by that state (see p. 9, infra). This is recognized by the Court of Appeals in the statement in its opinion that (Appx. A, infra, p. 23, R. 170)—

> "It is insisted **** that the time spent by appellee's (petitioner's) barges and tugs in transit through Kentucky waters is sporadic and irregular."

Although the Court could not and did not contradict this contention, it nevertheless held that the vessels were subject to apportionment taxation in Kentucky. The new criterion adopted by the Court of Appeals is stated in its opinion thus:

> "It seems to be sufficient, when in the ordinary course of business, that property is present and being used and employed with a consistent continuity and not spasmodically and temporarily."

The meaning of this is doubtful, but in the light of its application by the Court to the facts of the case it is certain that "consistent continuity" is a repudiation of the doctrine that tax apportionment is constitutionally based on the continuous protection afforded by the state throughout the tax year. The decision of the Kentucky Court of Appeals clearly conflicts with the decisions of this Court on a highly important aspect of interstate commerce and should be reviewed.

2. If the radical departure of the Kentucky Court of Appeals from the decisions of this Court

is permitted to stand, a new idea will be introduced in the law of apportionment taxation which will impose upon interstate commerce the burden of multiple taxation and which will cause far-reaching confusion and disturbance in the field of interstate transportation. As is said by Mr. Justice Frankfurter in the *Northwest Airlines* case (322 U. S. 296, footnote 2)—

> "Surely the situs which personal property may acquire for tax purposes in a state other than that of the owner's domicile cannot be made to depend on some undefined concept of 'permanence' short of a tax year, leaving the adequate size of the fraction of the tax year for judicial determination in each year. Such doctrine would play havoc with the tax laws of the forty-eight states. It would multiply manifold the recognized difficulties of ascertaining the domicile of individuals."

We have just such an "undefined concept" here. In the face of a record which conclusively showed that in every year there were many periods of many days' (even weeks') duration in which no vessel whatever was in Kentucky, the Kentucky Court of Appeals ignored the established principle that there must be an average number present every day, but instead relied on a finding of "consistent continuity" of use within the state based on the fact that the route most frequently travelled (between petitioner's two out-of-state terminals) passed through Kentucky. The Court did not state

the number of days in a year there must be during which some one or more of the vessels is present in the state in order to confer tax situs, although the question is immediately important if the requirement of presence every day is abandoned. The presence of an average number of "shifting units" every day is not too difficult to ascertain, but a criterion based on "consistent continuity" places on the courts the burden of determining the legal adequacy of the number of days or period of time that the vessels are present in the state in each year. Such a standard would be too uncertain and variable to be workable, and it would expose every towboat operating interstate to the possibility of taxation by every state through which it passes.

3. It is important that the law of the apportionment method of taxation be settled, for nothing could be more vital to interstate commerce than the liability of vehicles engaged in that commerce to taxation by the states through which they pass. The question was not wholly resolved with respect to water transportation by *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, in which this Court held that the rule of tax apportionment for rolling stock of railroads could be applied to watercraft. Indeed, the operation of the water carrier concerned in that case was very similiar to that of a railroad. The business of the petitioner, however, involving the operation of two towboats engaged in private carriage over hundreds of miles of river, is far more typical of the most common

method of water transportation and is radically different from the constant "in-and-out" movement of railroad rolling stock. Water carriage is generally more similar to air transportation in that the media of both are in the public domain, neither requires a right of way, and, usually, neither has "shifting units" constantly present in any particular jurisdiction outside of the states of their terminals. While under *Northwest Airlines v. Minnesota*, 322 U. S. 292, the application of the apportionment method of taxation to aircraft is left in doubt (cf. concurring opinion of Mr. Justice Jackson at 322 U. S. 302), all the various opinions in that decision clearly infer that in aircraft cases the railroad rolling stock rule of an average number constantly present must at least be met. Watercraft should have the same constitutional treatment as railroads and aircraft, but if the decision below is permitted to stand without review, a new uncertainty would arise and a constitutional difference between railroad and water transportation, denied in the *Mississippi Valley Barge Line Co.* case (supra), would be recognized.

4. The decision of the court below is contrary to Article IV of the Ordinance of 1787 (1 Stat. at L. 50, 51, 52, note; U. S. Code 1946 ed. p. xxxiii), adopted as an Act of Congress on August 7, 1789 (1 Stat. at L. 50, Ch. 8), and to Sec. 11 of the Compact of Virginia with Kentucky (Hening's Virginia Statutes at Large, Vol. 13, page 17), approved by Act of Congress of February 4, 1791 (1 Stat. at L. 189).

The last sentence of Article IV of the Ordinance of 1787 provides:

> "The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor."

Section 11 of the Virginia Compact provides:

> "Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

Both of these enactments remain in effect today as Acts of Congress. *Economy Light & Power Company v. United States*, 256 U. S. 113; *Wedding v. Meyler*, 192 U. S. 573.

In the *Northwest Airlines* case Mr. Justice Black pointed out (322 U. S. 302) that the national

problems arising from state taxation which bear in incidence upon interstate commerce call for Congressional action. Here we have a case where Congress has taken action and prohibited any tax on the use of the navigable waters of the Ohio, and here we have an attempted tax which has as its sole jurisdictional basis the fact that the vessels pass through Kentucky while navigating the river between ports in other states. The result is a tax on the privilege of navigation no matter by what name the tax is called. The Kentucky Court of Appeals has nullified these Congressional regulations of interstate navigation and its decision should be reviewed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

August 30, 1950

APPENDIX A

Opinion of Kentucky Court of Appeals

COURT OF APPEALS OF KENTUCKY
MARCH 17, 1950

(As modified on denial of rehearing June 2, 1950)

H. CLYDE REEVES, COMMISSIONER OF REVENUE FOR THE STATE OF KENTUCKY,
Appellant,

V. APPEAL FROM THE FRANKLIN CIRCUIT COURT, W. B. ARDERY, Judge,

ISLAND CREEK FUEL AND TRANSPORTATION COMPANY, A Corporation,
Appellee.

OPINION OF THE COURT BY JUDGE LATIMER

REVERSING

Pursuant to KRS 132.330, omitted tax assessment proceedings were instituted by the Commonwealth on relation of the Commissioner of Revenue, against appellee, Island Creek Fuel and Transportation Company.

Appellee sought, in the Frankfort Circuit Court, and obtained an injunction, permanently enjoining Clyde Reeves, as Commissioner of Revenue, his successors, agents, and attorneys, from prosecu-

ting the omitted tax assessment proceedings in the County Court of Boyd, Greenup, Lewis, Mason, Bracken, Pendleton, Campbell, and Kenton Counties. From that judgment, this appeal is prosecuted.

The question before us, therefore, is whether or not the Transportation Company's towboats and barges are subject to assessment in the manner proposed by the counties above.

The Island Creek Fuel and Transportation Company, a subsidiary of the Island Creek Coal Company, is a Maine corporation. It operates two towboats and a fleet of barges on the Ohio River, principally between Huntington, West Virginia and Cincinnati, Ohio. Its business, almost entirely, is the transportation of coal for the parent company. It has no published schedule of rates or charges. It does not hold itself out generally to transport coal or any other commodity for anyone except the parent company, and rarely performs towing or any service for others than the parent company, and then only by special contract. Approximately 500,000 tons of coal are handled annually by appellee, whose parent organization controls distribution outlets in Cincinnati. Appellee's principal office and place of business is located at Huntington, West Virginia, where extensive loading facilities are maintained. It has extensive docking and unloading installations, including cranes and elevators at Cincinnati. It also maintains mooring facilities

at Coal Haven, Campbell County, Kentucky, which are used when the exigencies of navigation require. The tows and barges have never been in Maine, the domiciliary state. The appellee does not pay an ad valorem tax on the craft in issue, and has never paid any such tax to any jurisdiction. It has never been authorized to do business in Kentucky, but within the years involved has made 116 calls at Kentucky ports, delivering 154 barges.

The proceedings herein were brought to assess omitted ad valorem taxes for 1938 to 1942, inclusive. During the years above appellee operated a fleet of river craft consisting of approximately 54 barges and 2 towboats. In each of the original proceedings to assess the omitted taxes, a statement was filed alleging that the Company habitually and continuously operated its boats and barges along a regular route between Huntington, West Virginia and Cincinnati, Ohio, of which route 94.6% was in Kentucky and 5.4% in West Virginia; that the aliquot part of 94.6% of the company's boats and barges, therefore, had a taxable situs in Kentucky, and proportionate fractions of that aliquot part, determined by mileage, had a taxable situs in the various counties and school districts.

Appellee insists that the attempted assessments are illegal because: (1) They are not only unauthorized by the Constitution of Kentucky or any Kentucky Statute, but are contrary thereto; (2) The Transportation Company's boats and

barges would not be taxable by the Commonwealth, or any of its subdivisions, even if such taxation were specifically authorized by the Constitution or Statutes; (3) The taxation of Transportation Company's boats and barges in the manner proposed would violate the laws and Constitution of the United States, and particularly the Ordinance of 1787 and the Virginia-Kentucky Compact.

It is apparent that if appellee is correct in any one of its contentions, the judgment of the lower court is proper. All points and propositions raised and discussed by appellants are directed to a converse view and must necessarily be included in a consideration of appellee's contentions. We shall, therefore, discuss the above contentions of appellee. Attention is directed first, to contention (2) above. This seems to be the logical beginning point. A finding that the property sought to be assessed herein has not acquired a tax situs in Kentucky would obviate a consideration of the other propositions.

It appears that the application of the principle mobilia sequuntur personam, which precluded the taxing of property belonging to a non-resident owner, has given way to the more modern rule that the actual situs of visible tangible personal property, and not the domicile of the owner, determines the place of taxation, and that tangible personal property may be taxed in the state where it is physically located. For purposes of taxation, rights

in tangibles are regarded as localized at the place where the tangible itself is located. Such property is subject to taxation by the state of its actual situs regardless of the domicile of the owner, and is not affected by the fact that the property is employed in interstate transportation either by water or by land.

Appellee strongly insists that these tugs and barges have not acquired a taxable situs in Kentucky in that they are only transiently present and that the essential element of permanency is lacking. It is insisted that there is no termini; no particular destination or regular port of call in Kentucky; and that the time spent by appellee's barges and tugs in transit through Kentucky waters is sporadic and irregular. In one of the briefs it is said: "To acquire such a situs the boats and barges must be permanently situated in the non-domiciliary State and permanently means continuously throughout the year, not a fraction thereof, whether days or weeks." True, the factors above mentioned do enter into the determination of taxable situs. The idea of permanency, with respect to personal property, seems generally to be, that for such property to acquire a taxable situs, it must have a more or less permanent location as distinguished from a transient or temporary one. However, permanency in the sense that it must be fixed like real property is not essential to the establishment of a taxable situs for personal property. It seems to be sufficient, when in the ordinary course of business,

that property is present and being used and employed with a consistent continuity and not spasmodically and temporarily.

Following this concept there seems to have evolved the idea of estimating, by some reasonable method of aliquot division, the situs of any particular part of a mass of property whenever the mass is being used in interstate business and it is impossible to assign a situs at large to it in entirety. Such method of determining the share of an interstate mass has been applied to a fleet of steamships, lines of railroad, and the mass of railroad cars. See Union Tank Line Co. v. Wright, 249 U. S. 275, 63 L. Ed. 602, 39 S. Ct. Rep. 276; Covington v. Pullman Co., 121 Ky. 218, 89 S. W. 116; and Baltimore & O. S. W. R. Co., v. Com., 177 Ky. 566, 198 S. W. 35.

It now appears that courts generally adhere to the rule that property sent into a state by a nonresident, to be used or employed permanently there, must bear its fair share of the burden of taxation, although no one unit of such property is ever more than temporarily located within the taxing state. It follows then that where the specific and individual items of property used and employed in the state are not continuously the same, but are constantly changing according to the exigencies of business, the tax should be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed.

In Commonwealth v. Union Pacific Railroad Company, 214 Ky. 339, 283 S. W. 119, 49 A. L. R. 1091, in elaborating upon this concept, it was said:

> "As we have seen, chattels 'transiently present in the transactions of commercial operations,' or but temporarily located within the state, do not as a general proposition acquire a situs for taxation within such state. However, if the resident of one state brings or sends his property into another state to use and employ it permanently there, it is settled that such property must bear its fair share of the burden of taxation, although no one unit of such property is ever more than temporarily located within the taxing state. The shifting units but take the place of each other, and the property as a whole receives the state's protecting care. Even as the hive is the hive, though the bees of the spring have long since been replaced by the bees of the summer and these by the bees of the fall, so the property is the property, though its units have changed many times in the course of the year. But, in the nature of things, there must be some cohesive principle which brings together the changing and shifting units so that we see the whole and not its parts. We have seen that the mere temporary presence of the chattel does not give the state the power to tax it. What is it that makes the mass of which it is a part, taxable when it itself is not taxable? Is it not the fact that the owner is using

> and employing them *together* as parts of a whole, which whole receives the protection of the state, that gives the state the right to tax them, not as units but as a whole? That this is true seems clear to us, and our conclusions are fortified by the opinion of the Supreme Court in passing on the right of the states to tax tank cars, refrigerator cars, Pullman cars and cars of like character owned by non-resident companies, but present in average number within such state throughout the taxing period."

See also Annotated Cases, 49 A. L. R. 1099.

Let us then, in the light of the above, look at the matter circumspectly. We note, first, that the parent company is an operator and producer of coal. Thus we start with the idea of permanency of business. Not only does the parent company produce coal, but undertakes, through its subsidiary organization, to transport and distribute its coal. In order to do this, this subsidiary company maintains extensive loading facilities at Huntington, West Virginia. Therefore, we must draw the thread of permanency from the parent company to the place of loading in West Virginia. This subsidiary company also maintains extensive docking and unloading installations at Cincinnati. In addition, thereto, it has mooring facilities at Coal Haven in Kentucky. The installation of these facilities all imply permanence of business operations. In order to carry out its permanent objective, the instru-

ments and means of transportation become a necessary part of the operating business. Thus the thread of permanency is drawn from Huntington through the waters of the Ohio from and to these loading and unloading points. In carrying out the business of distributing annually approximately 500,000 tons of coal, about 94.6% of the mileage covered by the craft of the subsidiary company is within Kentucky. We, therefore, do not limit our view to the accidents of appearance but look at all the facts which have inherent or relative significance. By correlating and coordinating these facts, we find a consistent, ordered and coherent whole. The fact then remains that the tugs and barges, an indispensable part of the whole as designed by appellee or its parent company in the operation of its business, are as necessarily present in Kentucky as the loading and unloading facilities have their situs in Ohio and West Virginia, respectively. This continuity and consistency of presence in Kentucky attaches such permanency as to take it out of the zones of mere transiency or a sporadic and temporary presence. The parts of this whole receive the protection of this State. We conclude they have acquired a tax situs here.

We now turn our attention to appellee's proposition (1) above. It is insisted that apportioned assessments of ad valorem taxes are void in Kentucky because same has no authorized constitutional or statutory sanction. Appellant takes the converse view and insists that the Commonwealth

of Kentucky not only has power to impose ad valorem taxes on the aliquot part of boats and barges of a foreign corporation having a situs within the boundaries of the taxing districts in Kentucky, but that the Constitution and Statutes mandatorily require that all property in Kentucky shall be taxed.

Sec. 171 of the Constitution, dealing with the levy and collection of taxes, provides that all taxes shall be levied and collected by general laws. It provides that taxes shall be uniform upon all property of the same class and that the General Assembly shall have power "to divide property into classes and to determine what class or classes of property shall be subject to local taxation."

Sec. 172 of the Constitution provides: "All property, not exempt from taxation by this Constitution, shall be assessed for taxation at its fair cash value . . ."

Sec. 174 provides: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempt by this Constitution . . ."

Sec. 175 provides: "The power to tax property shall not be surrendered or suspended by any contract or grant to which the Commonwealth shall be a party."

Sec. 3 of the Constitution provides that ". . . no property shall be exempt from taxation except as provided in this Constitution . . ."

Thus, we see the constitutional provision that "all property," unless exempted, shall be taxed in proportion to its value. These taxing provisions are "self-executing." The requirement is that all property, unless exempted, be assessed for taxation and taxed. No discretion is left to the General Assembly.

We now look to the statutory provisions. KRS 68.090 provides: "For county purposes the fiscal court of each county . . . shall levy an ad valorem tax on all property subject to county taxation."

KRS 132.190 provides: "The property subject to taxation, unless exempted by the Constitution, shall be as follows: (a) All real and personal property within this state . . ."

KRS 132.200 provides: "All property subject to taxation for State purposes shall also be subject to taxation in the county, city, school or other taxing district in which it has a taxable situs . . ."

Thus, we see the Statutes speak definitely in expressly authorizing and requiring that all property be taxed.

Complaint is specifically directed to the system of fragmentary taxation. Appellee contends that in order to have such system of taxation; that is, application of the apportionment method, it requires definite and specific legislation with ref-

erence thereto. We call attention to the case City of Covington v. Pullman Co., 121 Ky. 218, 89 S. W. 116, wherein the City of Covington was allowed to impose ad valorem taxes on the average number of pullman cars present in the City; and B. & O. S. W. R. Co. v. Commonwealth, 177 Ky. 566, 198 S. W. 35, where it was held that rolling stock of a foreign railroad company should be assessed for ad valorem taxes on the basis of the "average number of engines and cars constantly in use" in Kentucky. This was done in the absence of any apportionment statute. It was said in that case:

> "The statute does not prescribe any scheme for the assessment of the rolling stock of railroad companies other than the general one providing for the assessment of all personal property having a situs for taxation in this state."

In Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158, 78 L. Ed. 238, 54 S. Ct. 152, attempt was made by Pawnee County, Oklahoma, to assess ad valorem taxes on all of the oil tank cars used by the Refining Company, an Illinois Corporation, in hauling its products from its refinery to places outside the State. Throughout the year's time about 84% of the cars were without the county. The Supreme Court of Oklahoma held that all of the tank cars were taxable by Oklahoma and by Pawnee County. The Supreme Court, in reversing, directed that taxes be assessed on the "average number" of cars in the county. Even though the Supreme Court

of Oklahoma stated in its opinion that there was no law authorizing a tax based upon the average number, yet the U. S. Supreme Court remanded the case and directed that taxes be assessed on the average number.

Appellee insist that the apportionment method of taxing transient personalty must always of legal necessity be authorized by explicit legislation, and that under statutory provisions, conferring upon counties authority to assess personalty for taxation, a county can by no means be permitted, under its general taxing power, to apportion or allocate to itself a part or share of the value of an item or unit of personalty.

In City of Cincinnati v. Commonwealth, 292 Ky. 597, 167 S. W. (2d) 709, in discussing the method of allocation, this court cited Butler Bros. v. McColgan, 315 U. S. 501, 62 S. Ct. 701, 86 L. Ed. 991, in which the Supreme Court held that "One who attacks a formula of apportionment carries a distinct burden of showing by 'clear and cogent evidence' that it results in extra territorial values being taxed."

Appellant contends that the mileage basis, as undertaken herein, is the proper basis to adopt in view of the Supreme Court's decision in Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 431.

True, if the statute imposing the tax provided a method of apportionment, that method would be exclusive. But, as stated in B. & O. S. W. R. Co. v. Commonwealth, supra, the statute does not prescribe any scheme for the assessment. Consequently, we must look to see if the mileage basis is a fair and just method of calculating the aliquot part of appellee's boats and barges which have acquired a tax situs in Kentucky and in the several taxing districts.

Appellee conducts its operations throughout the year with relatively few interruptions. Its tugs and barges move along a route of 162 miles. We are persuaded that appellant's proposed method of assessment is logical and fair; that is, to apportion the taxes against the Company's boats and barges in proportion to the length of the line operated and location in each State, county and other taxing jurisdictions. This general scheme has foundation in numerous decisions. See State Tax Commission v. Central Greyhound Lines, 252 Ky. 300, 67 S. W. (2d) 35; City of Cincinnati v. Commonwealth, supra; Pullman Car Company v. Pennsylvania, supra; and Ott v. Mississippi Valley Barge Line Co. supra.

We turn our attention now to the third proposition. It is contended that the proposed assessment would violate the commerce clause of the United States Constitution, and the rights of the Transportation Company under the Ordinance of

1787, and the Virginia Compact. There is little or no discussion in appellee's brief relative to the violation of the commerce clause of the United States Constitution. However, we find no violation thereof. Appellee strenuously argues that the assessment of its boats and barges, if made, would violate the terms of the Ordinance of 1787 and the Compact of Kentucky with Virginia. The pertinent provisions of the above, respectively, are:

> "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other States as may be admitted into the Confederacy, without any tax, impost, or duty therefor.
>
> "The use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States."

We do not find extreme difficulty with this proposition. This is not an attempt to impose a usage tax on navigation, or a license tax, a privilege tax, or any tax on or because of the transportation or the right of transit through the State. It is nothing more than an attempt to tax property

having a tax situs within the State, whether on the river or off the river. The general rules and principles applicable herein have been enunciated by the courts on numerous occasions. See Escanaba & Lake Michigan Transportation Company v. City of Chicago, 107 U. S. 678, 2 S. Ct. 185, 27 L. Ed. 442; Huse v. Glover, 119 U. S. 543, 30 L. Ed. 487; City of Cincinnati v. L. & N. R. R. Co., 223 U. S. 390, 56 L. Ed. 481; Coyle v. Smith, 221 U. S. 559, 31 S. Ct. 688, 55 L. Ed. 853; Highman Towing Co. v. Cocreham, 70 F. Supp. 628, 165 F. (2d) 789. We cannot agree with appellant in this last contention.

We have had before us the benefit of elaborately and ably prepared briefs. To incorporate herein a full discussion of all matters argued in briefs would unduly lengthen this opinion. We have, therefore, limited our discussion to those which appear to us to have persuasive significance. The cases cited by appellee in support of its propositions are readily distinguishable, either on their facts or because predicated upon an entirely different basis, such as in the case of Bosworth v. Evansville & Bowling Green Packet Co., 178 Ky. 716, 199 S. W. 1059; where it will be noted that the Commonwealth based its claim solely on a supposed change of domicile and sought to apply the mobilia maxim, and made no attempt to show that the property had a tax situs in Kentucky.

The current method of procedure herein is an authorized and approved method of procedure. See

The Texas Company v. Commonwealth of Kentucky, 303 Ky. 590, 198 S. W. (2d) 316; and Newport v. Pennsylvania Railroad Co. 287 Ky. 613, 154 S. W. (2d) 719.

We conclude, therefore, that an aliquot portion of appellee's boats and barges has a taxable situs in Kentucky and in the river counties along the fixed route; that the apportionment method of taxation has constitutional and statutory sanction; and that same is not violative of the commerce clause of the United States Constitution, the Ordinance of 1787, or the Virginia Compact.

Wherefore, the judgment is reversed with directions to enter judgment consistent herewith.

APPENDIX B

Article IV—Ordinance of 1787

(Ch. 8, 1 Stat. at L. 50, 51, 52, note)

"The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor."

APPENDIX C

Section 11—Virginia Compact

(Hening's Virginia Statutes, Vol. 13, p. 17)

"Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, and of the proposed state, on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

APPENDIX D

KENTUCKY REVISED STATUTES

"Sec. 68.090—COUNTY POLL AND AD VALOREM TAXES; LIMITATIONS ON.

For county purposes the fiscal court of each county may levy a poll tax on each male resident of the county who is of the age of twenty-one years or over and is not exempt under KRS 142.020, and shall levy an ad valorem tax on all property subject to county taxation. This section does not authorize the fiscal court to levy a tax to pay any railroad bonded indebtedness or any interest thereon. The poll tax shall not exceed one dollar and fifty cents on each person taxed, and the ad valorem tax shall not exceed fifty cents on each one hundred dollars' worth of property taxed; except that, if an additional tax is required to pay the principal or interest on indebtedness of the county or a taxing district therein incurred prior to the adoption of the Constitution, the fiscal court may levy such additional tax as is authorized by law in force prior to the adoption of the Constitution."

"Sec. 132.190—PROPERTY SUBJECT TO TAXATION; SITUS.

(1) The property subject to taxation, unless exempted by the Constitution, shall be as follows:

(a) All real and personal property within the State, including intangible personal property of non-residents and corporations not organized under

the laws of this State that has acquired a business situs within this State, except that twenty-five domestic fowls to each family shall be exempt from taxation for any purpose.

(b) All intangible personal property of individuals residing in this state and of corporations organized under the laws of this state, wherever located.

(2) The property enumerated in paragraph (b) of subsection (1) of this section shall be considered and estimated in fixing the valuation of corporate franchises.

(3) Property shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

(remaining part of section dealing with intangibles omitted as not pertinent.)

"Sec. 132.200—PROPERTY SUBJECT TO STATE TAX ONLY.

All property subject to taxation for state purposes shall also be subject to taxation in the county, city, school or other taxing district in which it has a taxable situs, except the classes of property described in KRS 132.030 and 132.050, and the following classes of property, which shall be subject to taxation for state purposes only:"

(remaining part of section omitted as not pertinent)

"Sec. 132.330—ACTION BY DEPARTMENT OF REVENUE IN COUNTY COURT TO ASSESS OMITTED PROPERTY.

The field agents, accountants and attorneys of the Department of Revenue shall cause to be listed for taxation all property omitted by the county tax commissioners, board of supervisors, Kentucky Tax Commission acting as a board of valuation and assessment, or any other assessing authority, for any year omitted. The agent, accountant or attorney proposing to have the property assessed shall file in the office of the county clerk of the county in which the property may be liable to assessment a statement containing a description and value of the property or corporate franchise proposed to be assessed, the name and place of residence of the owner, his agent or attorney, or person in possession of the property, if known, and the year the property was unassessed. The county clerk shall thereupon issue a summons against the owner, or person in possession of the property, if the owner is unknown, to show cause before the next regular term of the county court that does not commence within five days after the service of the summons, why the property or corporate franchise shall not be assessed at the value named in the statement filed. No judgment shall be rendered against the alleged owner unless the statement filed contains a description of the property sought to be assessed that will enable the court to identify it. The summons shall be executed by the sheriff by delivering a copy thereof to the owner, or if he is not in the county to his agent, attorney or person in possession of the property. If the property is real property, and the owner is known but is absent from the state and has no attorney or agent in this state and no one

is in possession of the property, the summons shall be served by posting it in a conspicuous place upon the property; if the property consists of tangible personal property the summons shall be placed in a conspicuous place where the property is located. In the case of tangible and intangible personal property, where the owner and his place of residence are unknown and no one has possession of the property, an action for assessment shall be instituted by filing the petition above mentioned and procuring constructive service against the owner under the provisions of Paragraphs 58, 59 and 60 of the Civil Code. In all of the above cases an attachment of the property omitted from assessment may be procured against the owner, at the time of the institution of the action or thereafter, and without the execution of a bond by the Commonwealth or its relator, by the representative of the Department of Revenue making an affidavit that the property described in the petition is subject to state, county, school or other taxing district tax, and is unassessed for any taxable year."